EDITOR'S NOTE

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NO. 87-6926

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MILTON JOHNSON, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Does the Illinois death penalty statute violate the Constitution because after a defendant is found eligible for a death sentence, it places the burden on the defendant to prove that death should not be imposed?

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PETITION FOR WRIT OF CERTIORARI

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The petitioner MILTON JOHNSON respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Supreme Court.

OPINION BELOW

The opinion of the Supreme Court of Illinois has been published at 119 Ill.2d 119, 519 N.E.2d 100. A copy of the opinion is attached to this petition as Appendix A.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on December 21, 1987, and a petition for rehearing was denied on February 2, 1988. (Appendix A) This Court on March 28, 1988, allowed an extension of time to and including May 2, 1988, for filing a petition for writ of certiorari. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall...deprive any person of life, liberty or property without due process of law...

STATEMENT OF THE CASE

Following a jury trial in which petitioner Milton Johnson defended himself pro se, petitioner was convicted of four offenses of murder. A death penalty hearing was convened at the request of the State's Attorney. Petitioner waived a jury for the hearing and continued to represent himself. The trial court subsequently sentenced him to death.

The primary mitigating factor in the penalty consideration was that there was doubt of petitioner's guilt, even if the evidence was sufficient to support his convictions. See Spaziano v. Florida, 468 U.S. 447, 488 n. 34 (1984) (Stevens, J., joined by Brennan and Marshal, J.J., concurring in part and dissenting in part).

The evidence indicated that Pamela Ryan, Anna Ryan, Barbara Dunbar, and Marilyn Baers were the victims of homicides committed between 11:15 a.m. and noon on Saturday, August 20, 1983, in a southside Joliet ceramic shop owned and operated by Ms. Baers. (R. 2707-2747, 2786-2791, 2825-2831) Purses belonging to the Ryans and Ms. Baers later were found empty of money in a nearby creek. The three purses possibly had contained a total of $500 to $600. (R. 2744-2751, 2787-2793, 2856-2862) The Ryans and Ms. Dunbar had driven to Ms. Baers's shop in a 1977 Chevrolet Blazer owned by Bob Ryan. This vehicle later was found in a car wash bay half a block from the shop. (R. 2738-2739, 2768-2783, 2842-2843)

The State's evidence consisted of miscellaneous pieces of circumstantial evidence. First, Obrie Trotter testified that around 2:30 p.m. on August 20, 1983, he saw Mr. Johnson join a

crap game in a Joliet pool hall and lose approximately $500, including $160 to $180 to Trotter himself. (R. 2919-2922) Trotter gambled at the pool hall almost everyday and formerly dealt drugs outside. (R. 2923, 2935-2936) He was on probation for a felony offense, and the State contacted him about the present case through Trotter's probation officer in Cook County. (R. 2922, 2925-26) Under cross-examination, Trotter evaded the question of whether he was a police informant, answering "I don't know." (R. 2937-38)

Next, the State introduced evidence that a rag found near two of the victims bore two fragments of Negro hair. (R. 2963-64, 3042-3044, 3048-3049) The victims' clothing and other personal effects were inspected and no other Negro hairs were found. This inspection disclosed two Caucasian hairs. (R. 3052)

Next, the State introduced testimony that in March, 1984, police searched Mr. Johnson's home and found three cartridges with characteristics similar to the characteristics of fragments of a bullet found in the ceramic shop, and two pairs of Converse All-Star gym shces with tread patterns similar to shoe prints observed in and around the ceramic shop, and in the car wash bay near the Chevy Blazer. (R. 2836-2848, 2853-2856, 3001-3010, 3055-3091) The bullet fragments exhibited Lubaloy coating and could have been from a .357 magnum cartridge. (R. 3058, 3078-79) The cartridges from Mr. Johnson's home were Winchester Western .357 magnum shells with Lubaloy coating. (R. 2854-56, 3056-57) This type of Winchester Western ammunition was commonly available. The fragments also could have been from a less common Yugoslavian-made bullet with the same coating. (R. 3074-3080) The two pairs of shoes alleged to be Mr. Johnson's were size 10

and size 11, both consistent with the unidentified impressions. (R. 3081-3082) The shoeprints displayed certain individual characteristics, but none matched any individual characteristics on the soles of the shoes from Mr. Johnson's home, and therefore it could not be said that those shoes made the prints in question. (R. 3081, 3086)

The State also introduced evidence that two fingerprints found inside the Chevy Blazer, on the driver's side door handle and on the shift handle, matched Mr. Johnson's fingerprints. (R. 3092-3109) One of the prints was formed in a substance which resembled blood, and a chemical staining test indicated that the substance contained a high concentration of protein as blood does. (R. 3101-3102) There were three other finger or palm prints in and on the Blazer suitable for comparison that were not Mr. Johnson's nor any of the victims', although one of the palm prints was not eliminated as Anna Ryan's because a print of that portion of her hand was unavailable for comparison. (R. 3134-3137, 3139-3140)

In Mr. Johnson's defense, Loretta Woods, evidently a black person, testified that she visited the ceramic shop numerous times during the year preceding the homicides, including the Thursday before they occurred. (R. 3203-3205)

Daniel Jones and Sandra Killman testified that on the afternoon of August 20, 1983 they saw not Milton Johnson, but a white male with blondish hair driving the Ryans' Chevy Blazer. Mr. Jones testified that he saw the Blazer on the road between 2 and 3 p.m. He was acquainted with Bob Ryan through work and knew Ryan's "very distinctive vehicle." (R. 3214-3219) Mr. Jones sometimes beeped his horn and waved when he passed Bob Ryan on

the road, and on this occasion started to beep and wave when he recognized that Bob wasn't driving. (R. 3216-3217) Mr. Jones stated that the driver had "blondish-type, kind of dishwater, ruddy hair," and was slim. (R. 3217-3218)

Sandra Killman testified that between 12:45 and 3:00 p.m. on August 20, 1983, she was driving with her two daughters and playing a game based on reading license plates on passing cars. (R. 3241-3249) One of the vehicles they observed was a Chevrolet Blazer with license plate number RR650. She identified a photograph of the Ryan Blazer, displaying the same registration number, as the one she saw. She had previously driven by the car wash on Cass Street and the Blazer was not there. (R. 3242-3243) She stated that the Blazer's driver was a white male with sandy blond, shoulder length hair, in his early 20's. (R. 3246-3247)

Randall Ruth and Diane Holly testified that they separately visited the car wash in the late afternoon on August 20, 1983 and the Ryans' Blazer was not there. (R. 3284-3298)

On appeal, the Illinois Supreme Court adhered to its previous holdings that the Constitution did not require the State to prove the absence of mitigating factors beyond a reasonable doubt or require the sentencer to consider whether capital punishment was appropriate. (Appendix A, 518 N.E.2d at 115).

REASON FOR GRANTING CERTIORARI

CERTIORARI IS WARRANTED BECAUSE DEATH-ELIGIBLE DEFENDANTS IN ARIZONA AND MARYLAND, AS WELL AS ILLINOIS, ARE ASSIGNED THE BURDEN OF PROOF ON THE ISSUE OF THEIR EXECUTION, AND THIS BURDEN VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. The Illinois death penalty statute places the burden of persuasion on the defendant to show that death should not be imposed, after a statutory aggravating factor has been found.

The Illinois Death Penalty Act provides:

> If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.
>
> Unless the court unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.
>
> Ill.Rev.Stat. 1983, ch. 38, sec. 9-1(h).

By requiring imposition of the death penalty in the absence of mitigating factors "sufficient to preclude" it, the plain effect of this statute is to create a mandatory rebuttable presumption in favor of a death sentence, once a statutory aggravating factor has been found. See Francis v. Franklin, 471 U.S. 307 (1985).

In People v. Owens, 102 Ill.2d 88, 464 N.E.2d 261 (1984), the Illinois Supreme Court stated that "if there is no mitigating factor for the court to weigh against an aggravating factor that has been found to exist beyond a reasonable doubt, the statute obligates the judge to impose the death sentence, as the sentencing court here observed." 464 N.E.2d at 273. In People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986), the court

similarly noted "that once the State established the existence of statutory aggravating factors, defendant had the burden of coming forward with evidence of mitigating factors sufficient to preclude imposition of the death penalty." 493 N.E.2d at 592.

Justice Marshall has recognized that this provision of the Illinois statute "places on the defendant the burden of proving that death is not appropriate in his particular case." Gacy v. Illinois, 470 U.S. 1037 (1985) (Marshall, J., dissenting from denial of certiorari). So has the federal district court in Kubat v. Thieret, slip op. at 54-55 (N.D. Ill., No. 87-C-8423, February 25, 1988). (A copy of the relevant portion of the slip opinion in Kubat is attached to this petition as Appendix B.)

B. Other states, including Arizona and Maryland, also assign eligible defendants the burden to prove that death should not be imposed.

The Arizona death sentencing law, like the Illinois law, establishes a presumption that death is appropriate upon a finding of a statutory aggravating circumstance. Richmond v. Ricketts 640 F.Supp. 767, 787-788 (D. Ariz. 1986), citing A.R.S. sec. 13-454(A) et. seq. The Arizona statute then assigns the defendant the burden of proving mitigating factor, "'sufficiently substantial to call for leniency,'" or death is imposed. Richmond, 640 F.Supp. at 787. With no analysis or discussion of this Court's pertinent decisions, the federal district court in Richmond declared that this was not an unconstitutional burden of proof. 640 F.Supp. at 788.

In Mills v. Maryland, No. 87-5376, the Court may observe that Maryland law also places the burden of persuasion on

death-eligible defendants to establish mitigating circumstances that "outweigh" aggravating circumstances by a preponderance of the evidence, or be put to death. Md. Code (1957, 1982 Repl. Vol., 1987 Cum. Supp.), Art. 27, sec. 413 (h)(1), (2) and (3).

In Lockett v. Ohio, 438 U.S. 586 (1978), the Court recognized but left open the question of whether Ohio's former death penalty statute was unconstitutional for requiring defendants "to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases." 438 U.S. at 609 n. 16. In view of the prominence of this requirement in states' capital sentencing schemes, the Court should grant certiorari.

C. By placing the risk of nonpersuasion on the defendant, the statute violates the Eighth Amendment because death may be imposed without an individualized determination that it is appropriate in the particular case.

The Eighth Amendment demands that capital sentencing procedures provide an individualized determination "that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Therefore death sentences imposed under mandatory sentencing schemes such as that considered in Woodson are impermissible. Sumner v. Shuman, 483 U.S. ___ (1987).

The same defect exists in a provision that places the burden of persuasion on the defendant. Jackson v. Dugger, 837 F.2d 1469, 1473-1474 (11th Cir. 1988). If the sentencer concludes that the aggravating and mitigating evidence is equally balanced, or even if the sentencer feels that the mitigating evidence

outweighs the aggravating evidence but not by a sufficient margin to meet the defendant's legally imposed burden, a death sentence results despite no determination having been made by the sentencer that the defendant's background, character, and crime merit its imposition. Similarly, in a case where no mitigating factors exist and the presence of a statutory aggravating factor therefore mandates imposition of a death sentence, as described in Owens, supra, the sentence does not reflect an individualized decision. The statute "obligates" the sentence to impose death without allowing the sentencer to determine whether despite the presence of an aggravating factor, the death penalty is the appropriate moral resporse. Owens, supra.

The Eleventh Circuit in Jackson v. Dugger, supra, thus reasoned that a jury instruction stating, "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided," was unconstitutional. 837 F.2d at 1473-1474. With respect to the Illinois statute here at issue, Judge Bua employed similar reasoning and cautioned, in dictum, that the statute "seems to clash with" the Court's mandatory-sentencing holdings and was "vulnerable to constitutional attack." (Appendix B, Kubat v. Thieret, supra, slip op. at 55.)

D. By placing the risk of nonpersuasion on the defendant, the statute violates the Fourteenth Amendment.

In addition, fundamental concepts of due process of law are offended by requiring the individual to bear the burden of

persuasion on the question of whether his life should be taken or spared. "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account." Speiser v. Randall, 357 U.S. 513, 525-526, (1958). The allocation of a burden of proof is "a prime instrument for reducing the risk" of error against the party which does not bear the burden. In Re Winship, 397 U.S. 358, 363 (1970). By placing "upon defendant the burden of coming forward with evidence of mitigating factors," the Illinois death penalty statute reduces the risk that death will not be imposed in cases where it is appropriate, and increases the risk that death will be imposed in cases where it is not appropriate. Olinger, 493 N.E.2d at 593.

The burden of proof requirement which ordinarily rests on the State in a criminal prosecution reflects the significance of the defendant's interests at stake. Winship, 397 U.S. at 363-364. Therefore in a death penalty hearing, where the defendant's interest at stake is life itself, due process must require at minimum that if there is a a burden of proof it cannot be on the defendant. The Court has recognized that a basic requirement of procedural fairness in capital sentencing is "that the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon v. Illinois, 391 U.S. 510, 522 n. 20 (1968). The allocation of the burden of proof plainly affects the scales in any litigation and even "may be decisive of the outcome." Speiser, 357 U.S. 525.

In sum, capital sentencing schemes which, upon proof of a statutory aggravating factor, place the risk of nonpersuasion on the defendant to show that the death penalty is not appropriate are unconstitutional. Certiorari is warranted because the Illinois statute is representative of such schemes.

CONCLUSION

For the foregoing reasons, MILTON JOHNSON, petitioner, respectfully asks that a writ of certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A

tive duty to disclose to defendant's counsel mitigating evidence of which it has knowledge and it therefore has the burden of going forward with the evidence in a sentencing proceeding. (97 Ill.2d at 392, 73 Ill.Dec. 360, 454 N.E.2d 220.) Having decided that Rule 412(c) applies to sentencing proceedings, there is no justification for holding that the other provisions of Rule 412 are not applicable.

The majority cites *People v. DeWitt* (1979), 78 Ill.2d 82, 34 Ill.Dec. 319, 397 N.E.2d 1385, in support of its assertion that the discovery provisions of our rules are not applicable to sentencing proceedings. In that case the court held that our Rule 411 does not entitle an accused to discovery at a probation revocation hearing. (78 Ill.2d at 86, 34 Ill.Dec. 319, 397 N.E.2d 1385.) The rule announced in *DeWitt* was that in the absence of a constitutional requirement, the decision whether to allow discovery at a hearing should be made by comparing the interest of the defendant with the interest of the State. (78 Ill.2d at 87, 34 Ill.Dec. 319, 397 N.E.2d 1385.) The State's interest in incarcerating a probationer who committed another crime outweighed the defendant's interest in conditional liberty. (78 Ill.2d at 87, 34 Ill.Dec. 319, 397 N.E.2d 1385.) In the instant case, however, the defendant's fundamental interest in preserving his life obviously outweighs the State's interest in expediting the sentencing hearing.

The facts surrounding the defendant's request for discovery further demonstrate the necessity of applying Rule 412(a) to sentencing proceedings. On May 14, 1985, approximately three weeks prior to trial, the defendant filed a motion for discovery of the names and addresses of witnesses the prosecution intended to call at the death penalty hearing. The trial court granted the motion on May 23, over the State's objection. The State did not comply until June 10, one day before the sentencing hearing began. At that time the prosecutors tendered a list of 28 persons they intended to call in aggravation at the penalty hearing. Defense counsel attempted to contact and interview as many of the 28 witnesses as he could overnight. The next day in court, out of necessity, defense counsel moved for disclosure of the prosecutors' notes of interviews with the witnesses to aid him in cross-examining them. The trial court refused this request.

The statute governing death penalty hearings requires that each side have a "fair opportunity to rebut any information received at the hearing." (Ill.Rev.Stat. 1985, ch. 38, par. 9-1(e).) The prosecutors' notes of prior statements by the witnesses were a valuable tool for cross-examination, particularly in view of the delay in providing a list of witnesses to the defendant. (*See Jencks v. United States* (1957), 353 U.S. 657, 667, 77 S.Ct. 1007, 1013, 1 L.Ed.2d 1103, 1111.) Refusing to allow defense counsel access to those notes deprived defendant of a fair opportunity to rebut the witnesses' testimony in violation of the statute governing the procedures to be followed at death penalty hearings (Ill.Rev.Stat.1985, ch. 38, par. 9-1(e)). Given our prior application of Rule 412(c) to sentencing hearings, the defendant's fundamental interest in preserving his life and the requirement that both parties at a death penalty hearing have a fair opportunity to rebut any evidence presented at the hearing, a defendant should be entitled to use the discovery provisions of Rule 412(a) at a sentencing hearing.

Because of these significant errors at both the trial and the sentencing hearing, I would remand this case for a new trial.

119 Ill.2d 119

The PEOPLE of the State of Illinois, Appellee,

v.

Milton JOHNSON, Appellant.

No. 63021.

Supreme Court of Illinois.

Dec. 21, 1987.

Rehearing Denied Feb. 2, 1988.

Defendant, convicted after jury trial in the Circuit Court, Will County, Robert R. Buchar, J., of four counts of murder and four counts of felony murder, and sentenced to death on each count of felony-murder, appealed. The Supreme Court, Thomas J. Moran, J., held that: (1) defendant was adequately admonished concerning his waiver of right to counsel; (2) prosecutor's opinion that license plate would have been impossible to read was not improper assertion of personal opinion based upon facts not in evidence; and (3) imposition of death penalty was not excessive.

Judgment affirmed.

Simon, J., filed opinion concurring in part and dissenting in part.

1. Criminal Law ⇐641.4(4)

Failure to specifically advise defendant that, because of previous murder conviction, defendant faced mandatory minimum sentence of life imprisonment upon conviction of either felony-murder or murder did not render defendant's waiver of counsel invalid, where trial court advised defendant of his right to be represented, informed defendant of charges and where offenses took place, explained phases of death penalty hearing and right to jury during those phases, and record revealed that defendant was aware of minimum penalty. S.H.A. ch. 110A, ¶ 401(a); U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐730(12)

Prosecutor's characterization of defendant as "animal," although improper, was not prejudicial, where jury was specifically instructed that closing arguments were not evidence and to disregard any statements made during arguments which were not based on evidence, comment was isolated remark and not dwelled upon by prosecution, and evidence presented at trial was not even closely balanced.

3. Criminal Law ⇐719(3), 720(6)

Although it is improper for prosecutor to express his personal opinion or to argue facts which are not based on any evidence, it is perfectly permissible for prosecutor to state opinion which is based on record, or on legitimate inference derived therefrom.

4. Criminal Law ⇐719(3)

Prosecutor's opinion that it would have been impossible for witness to have read license plate was based on testimony relating to distance from which witness claimed to have observed plate and height of letters appearing on license plate, and therefore, was not improper assertion of personal opinion based on facts not in evidence.

5. Criminal Law ⇐641.7(1)

Defendant's Sixth Amendment rights to counsel were not violated by trial court's failure to repeat at subsequent sentencing proceeding same admonishments on right to counsel given defendant prior to trial. U.S.C.A. Const.Amend. 6.

6. Homicide ⇐354

Given defendant's prior serious criminal history, including prior conviction for murder, and multiple offenses of murder involved in instant case, imposition of death penalty was not excessive on multiple counts of felony murder.

7. Criminal Law ⇐986.6(3)

Hearsay testimony is not per se inadmissible during second phase of sentencing proceeding, even where there has been no showing that declarant is unavailable to testify.

8. Homicide ⇐354

Even if testimony of investigator with state police and of witness to one of defendant's previous offenses was erroneously admitted in second phase of sentencing hearing in murder prosecution, error was harmless, where sentencing hearing was conducted by trial judge, acting without jury, who was presumed to consider only competent and relevant evidence in determining sentence.

Neil F. Hartigan, Atty. Gen., Roma J. Stewart, Sol. Gen., Mark L. Rotert, Kenneth A. Fedinets, Asst. Attys. Gen., Chicago, for appellee.

Charles M. Schiedel, Deputy Defender, Office of the State Appellate Defender, Supreme Court Unit, Springfield, Gary S. Rapaport, Asst. Defender, for appellant.

Justice THOMAS J. MORAN delivered the opinion of the court:

Defendant, Milton Johnson, was indicted in the circuit court of Will County for four counts of murder and four counts of felony murder in violation of sections 9-1(a)(1) and 9-1(a)(3), respectively, of the Criminal Code of 1961 (Ill.Rev.Stat.1983, ch. 38, pars. 9-1(a)(1), (a)(3)). He was tried by a jury and found guilty on all eight counts. At a separate bifurcated sentencing hearing, as to which defendant waived his right to a jury, the trial court found that the necessary aggravating factors existed, and that there were no mitigating circumstances sufficient to preclude imposition of the death penalty. The court thereupon sentenced defendant to death on each of the felony-murder convictions. No sentence was pronounced as to the four murder convictions. Defendant's post-trial motion was denied, and he brings a direct appeal to this court (Ill. Const.1970, art. VI, § 4(b); 107 Ill.2d R. 603), alleging numerous errors at all stages of the proceedings.

The evidence adduced at trial reveals that on August 20, 1983, four women were murdered in the "Greenware by Mary" ceramic shop, located on East Cass Street in Joliet, Illinois. Three of the victims, 29-year-old Pamela Ryan, 38-year-old Barbara Dunbar, and 46-year-old Marilyn Baers, the owner of the ceramic shop, sustained multiple stab wounds which caused their death. The fourth victim, Anna Ryan, age 75, was stabbed and shot to death.

The first issue we address is whether defendant knowingly and effectively waived his right to counsel during the guilt phase of the trial.

The record reveals that on August 16, 1984, defendant appeared for his arraignment without counsel. The trial court furnished him with a copy of the indictment, which set forth the nature of the charges. Defendant waived reading of the indictment, stating that he was "familiar with it." At his request, the court then set a new date for the arraignment to allow defendant additional time in which to secure private counsel.

On September 13, 1984, defendant appeared in court represented by his counsel, William Swano. Mr. Swano waived formal reading of the indictment, and entered defendant's plea of not guilty to each of the charges.

Approximately two months later, defendant's counsel filed a motion for leave to withdraw because of defendant's inability to pay his legal fees. During the December 19, 1984, hearing, the trial court initially denied the motion, indicating that defendant's inability to compensate Mr. Swano in accordance with their prior agreement was an insufficient basis upon which to permit Mr. Swano leave to withdraw. However, defendant then personally addressed the court, stating that he wished to have his counsel "dismissed" from the case because he would not receive "true legal representation by an attorney who isn't being paid for his services."

Defendant further advised the court that he would prefer not to be represented by the public defender's office, and specifically requested the court not to appoint the two assistant public defenders who represented him in a previous murder trial. Defendant indicated that he would be "more than satisfied" if the court appointed Mr. Andreano of the public defender's office to represent him. Accordingly, the court granted Mr. Swano leave to withdraw, and appointed Mr. Andreano to represent defendant.

On September 30, 1985, the date upon which the trial was scheduled to proceed, defendant orally advised the court that he no longer wished to be represented by Mr. Andreano and the assistant public defender assigned to the case, Mr. Orloff. He filed a *pro se* motion on October 1, 1985, in which he requested the court to "remove" his present counsel and appoint him "other counsel from outside of the Public Defender's office and from outside of Will County." Defendant claimed in the motion that his counsel denied him opportunities to review discovery materials, refused to investigate certain matters, and failed to contact certain individuals whom he believed should be interviewed.

During the hearing on the motion, defendant stated that he was unable to communicate with his attorneys, and that they were attempting to "convict me more than the State is right now." He further claimed that his attorneys refused to interview certain individuals with whom the police spoke in connection with the murders. When the court inquired as to the basis for defendant's belief that these individuals gave statements to the police, he responded: "It comes around. You hear it, you check it out, you find out. That's all I can tell you about it." Defendant conceded that no one ever informed him that the individuals he wished to have interviewed spoke with the police.

In response to defendant's motion, the State represented to the court that, during his previous murder trial, defendant also moved to dismiss his counsel on the date of trial, claiming he was unable to communicate with the attorneys appointed to represent him. Defendant did not dispute this representation.

At the conclusion of the hearing, the court denied defendant's motion, finding that he failed to provide any basis upon which the court should appoint other counsel.

During another hearing conducted on the afternoon of October 1, 1985, defendant informed the court that he refused to accept Messrs. Andreano and Orloff as his attorneys; he refused to represent himself; and that he intended to absent himself from the proceedings. The court advised defendant that he had a right not to be present during trial, but that he would require his counsel to conduct the defense.

On October 2, 1985, the date scheduled for jury selection, defendant changed his mind and appeared in court. Since it was unclear at that time whether he intended to proceed *pro se*, or to absent himself from the proceedings, the court gave defendant the following admonishments:

> "THE COURT: Mr. Johnson, you had previously been represented in this cause by privately retained counsel, Mr. Swano, is that correct? * * *
>
> MR. JOHNSON: Original counsel in this case, yes.
>
> THE COURT: Okay, and during the time that Mr. Swano represented you, he advised you of the charges against you, did he not?
>
> MR. JOHNSON: Yes.
>
> THE COURT: Four separate distinct felony murder charges, as well as four murder charges involving four different people, is that correct?
>
> MR. JOHNSON: Yes.
>
> THE COURT: Allegedly occurring at a ceramic shop on East Cass Street. He also informed you as to the possible sentence or sentences that could be imposed if you were found guilty of any or all of these charges, is that correct?
>
> MR. JOHNSON: Yep.
>
> THE COURT: You are aware that they are capital cases? In other words, if the State, upon conviction of any of these charges, could request, and did, in fact, indicate early in this cause that they were going to seek a death sentence hearing in the event of any conviction, is that correct?
>
> MR. JOHNSON: True.
>
> THE COURT: So that you're fully aware of that?
>
> MR. JOHNSON: I am.
>
> THE COURT: You're also fully aware that you are entitled to be represented by a lawyer, that your original lawyer retained by you or your family was allowed to withdraw when it developed that certain monetary arrangements could not be completed by you or your family, and that you insisted that he be allowed to withdraw because in your words you didn't think if he wasn't getting paid he would do the maximum effort in your behalf, is that a correct statement?
>
> MR. JOHNSON: True.
>
> THE COURT: Following the allowance of that withdrawal, the Court appointed [the] Public Defender and indicated Mr. Sam Andreano, Public Defender, would be one of the counsel representing you, and that you had no objection at that

> time to Mr. Andreano, is that a correct statement?
>
> MR. JOHNSON: True.
>
> THE COURT: And that that appointment was made, sir, on December 19th of 1984, that is the date that Mr. Swano [was] relieved and that is the same date that Mr. Andreano was appointed with certain restrictions on Mr. Andreano, at your request, that Mr. Alex Bonds and Mr. Ira Goldstein, Assistant Public Defenders, would not be assigned to the case in any way, is that correct?
>
> MR. JOHNSON: True.
>
> THE COURT: And that from that December 19th, 1984, up until September 30, 19[5], there had been no request by you * * * to remove Mr. Andreano and Mr. Richard Orloff from representing you. The first motion or indication of any dissatisfaction was on September 30th, is that correct?
>
> MR. JOHNSON: True."

The court then asked defendant whether he still wished to absent himself from the proceedings. Defendant responded that he did "not know" but that he would decide after talking further with Mr. Andreano. The court then recessed the proceedings to allow defendant an opportunity to consult with his counsel.

When court reconvened shortly thereafter, Mr. Orloff stated that he and Mr. Andreano spoke with defendant and that they would continue to represent him. However, when the court asked defendant if he was accepting them as his counsel for the duration of the trial, he stated that he was not. The court again inquired of defendant whether he intended to proceed *pro se*, and he responded that "[T]hese counsel and I are trying to get an understanding. That's the only thing I can say about these counsels right now."

At the conclusion of the hearing, defendant represented that he was willing to communicate with his counsel. Accordingly, the court continued the proceedings until the following day to allow him a further opportunity to consult with them.

When court reconvened on October 3, 1985, Mr. Andreano stated that defendant refused to speak with him and that nothing "has been resolved nor can it be." The court thereupon advised defendant that he would be required to proceed *pro se*, but that Messrs. Andreano and Orloff would be appointed as standby counsel "available for advice and consultation at all times during the course of this trial." The trial was continued until November 12, 1985, to provide defendant with an opportunity to review the discovery and prepare for trial.

On November 12, 1985, the court again asked defendant whether he would accept Messrs. Andreano and Orloff as his attorneys. At that time, defendant indicated that he would prefer to have them represent him than to proceed *pro se*. Defendant also advised the court that he believed his prior counsel, Mr. Swano, failed to tender to his current counsel all of the discovery materials pertaining to the case. The court thereupon continued the case to subpoena Mr. Swano and hold a hearing on defendant's claim.

Mr. Swano appeared in court on November 20, 1985, at which time an extensive hearing was conducted. The court determined that defendant's allegations were unwarranted, and rescheduled the trial for the following day. The defendant again advised the court that he was accepting Mr. Andreano, and a new assistant public defender, Kathleen Kallen, to represent him. At Mr. Andreano's request, the court continued the trial date to allow defendant further opportunities to consult with his lawyers, and to file any desired pretrial motions.

On November 26, 1985, during a hearing on various motions, defendant advised the court that he did not agree with a proposed stipulation his attorneys intended to enter into with the State regarding certain evidence. As a result, he again refused to be represented by his counsel and informed the court that he would not be present for the trial. The court thereupon reappointed Mr. Andreano and Ms. Kallen as standby counsel.

The case was continued until December 2, 1985. On that date, defendant inquired

about the types of matters as to which he could consult with standby counsel. The court responded that they could advise him with respect to *voir dire* questions and the examination of witnesses, and they would aid in the preparation of any subpoenas defendant wished to issue. The court advised defendant that standby counsel could not conduct any witness examinations.

During another hearing held later that afternoon, the court again admonished defendant that the offenses charged could be the basis for imposition of the death penalty. The court also advised defendant that if he were convicted, he could receive a death sentence because of his prior murder conviction. Finally, the court explained to defendant the two phases of the death penalty hearing and stated that, in the event the jury did not impose the death sentence, "the Court will give the number of years" for which defendant would be incarcerated. The court failed to apprise defendant that, as a result of his prior murder conviction, life imprisonment was the minimum sentence that could be imposed if he were convicted of any of the offenses charged.

On December 3, 1985, the court conducted a hearing relative to the parties' proposed *voir dire* questions. Two of the questions prepared by standby counsel, and reviewed by defendant, related to the jurors' attitude toward life imprisonment as a penalty for the offense of murder. In defendant's presence, the State objected to these proposed questions, stating: "If the Defendant is convicted, it's [life imprisonment] a mandatory sentence * * *." Defendant agreed to omit these two questions.

The trial commenced after several days of jury selection. Defendant questioned the prospective jurors, delivered an opening statement, argued evidentiary issues, cross-examined the State's witnesses, and called several witnesses to testify on his behalf. Although defendant's standby counsel were present throughout the trial, the record does not disclose whether they actually assisted defendant during the course of the proceedings.

[1] Defendant initially contends that he did not knowingly and intelligently waive his right to counsel during the guilt phase of the trial where he was not properly admonished in accordance with our Rule 401(a) (107 Ill.2d R. 401(a)). In a related contention, he argues that his sixth amendment right to counsel was violated because the trial court incorrectly advised him as to the minimum sentence that would be imposed in the event he was convicted. The State responds that Rule 401(a) admonishments were unnecessary because defendant did not actually waive his right to counsel. In the alternative, it is argued that even if the admonishments were required, the trial court substantially complied with Rule 401(a).

Supreme Court Rule 401(a) provides, in relevant part:

> "Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
>
> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court."

107 Ill.2d R. 401(a).

We note initially that defendant failed to raise this issue in his *pro se* post-trial motion. "The general rule is that the failure by a defendant to raise an issue in the written motion constitutes a waiver and the issue cannot be urged as a ground for reversal on review. This waiver rule applies to constitutional as well as to other issues." *People v. Precup* (1978), 73 Ill.2d 7, 16, 21 Ill.Dec. 863, 382 N.E.2d 227, citing *People v. Pickett* (1973), 54 Ill.2d 280, 296 N.E.2d 856.

Further, we find that, under the circumstances of this case, defendant was properly admonished in accordance with Rule 401(a).

Contrary to defendant's contention, the record reveals that he was informed of the "nature of the charges" against him. The trial court specifically advised defendant that he was charged with "four separate * * * felony murder charges, as well as four murder charges involving four different people," and that the offenses occurred "at a ceramic shop on East Cass Street." Moreover, defendant was furnished with a copy of the indictment, and informed the trial court that he was "familiar with it." He further represented that his original counsel, Mr. Swano, also informed him as to the nature of the charges. Defendant never indicated to the trial court that he did not understand the charges, and he does not make that claim here.

We do agree with defendant that he was not specifically advised by the trial court that, because of a previous murder conviction, he faced a mandatory minimum sentence of life imprisonment upon conviction of any of the offenses here charged. He contends that, in the absence of a strict, technical compliance with Rule 401(a), any waiver of counsel will automatically be invalid and the alleged error reversible (*E.g., People v. Ibarra* (1981), 92 Ill.App.3d 1106, 48 Ill.Dec. 415, 416 N.E.2d 688; *People v. Montoya* (1981), 94 Ill.App.3d 6, 49 Ill.Dec. 440, 418 N.E.2d 84; *People v. Brown* (1980), 80 Ill.App.3d 616, 35 Ill.Dec. 846, 399 N.E.2d 1374.) The State, in turn, directs our attention to several appellate court cases which hold that substantial compliance with Rule 401(a) is sufficient. *E.g., People v. Black* (1979), 68 Ill.App.3d 309, 24 Ill.Dec. 758, 385 N.E.2d 899; *People v. Pittman* (1979), 75 Ill.App.3d 683, 31 Ill.Dec. 500, 394 N.E.2d 702; *People v. Jackson* (1978), 59 Ill.App.3d 1004, 17 Ill.Dec. 539, 376 N.E.2d 685.

We believe that where, as here, a review of the entire record indicates that defendant's waiver of his right to counsel was made knowingly and voluntarily, and the sole admonishment which he did not receive in no sense prejudiced defendant's rights, substantial compliance with Rule 401(a) is sufficient to effectuate a valid waiver of counsel. Further, under the circumstances of this case, we find that the trial court's admonishments substantially complied with the Rule.

The trial court advised defendant of his right to be represented by counsel, informed him of the charges and where the offenses took place, explained to him the phases of the death penalty hearing and his right to a jury during those phases of the proceeding. Defendant was also fully and repeatedly admonished regarding the possibility that he might receive a death sentence, both because of his prior murder conviction and because of the nature of the offenses charged. Although the trial court did not advise defendant that life imprisonment was the minimum penalty to which he would be subjected in the event he was convicted of the charges, the record reveals that he was aware of this penalty.

As previously noted, defendant reviewed the *voir dire* questions drafted by his attorneys, two of which referred to life imprisonment as a punishment for the offenses charged. In defendant's presence, the State objected to these proposed questions on the ground that life imprisonment was a "mandatory sentence." Contrary to defendant's claim, we do not believe that the fact he subsequently agreed to omit these questions indicates that he did not realize he could receive a sentence of life imprisonment.

We note in this connection that defendant does not claim he was unaware of the potential penalties in the event he was convicted of the charges. Indeed, he was initially represented by privately retained counsel, and defendant represented to the court that his attorney informed him of the possible penalties that could be imposed if he were found guilty on any or all of the charges.

Moreover, the record reveals that defendant is no stranger to criminal proceedings. He had previously been tried and convicted for aggravated battery, burglary and rape, and was incarcerated for those offenses

from 1970 until March of 1983. Subsequently, he was convicted of murder, attempted murder, rape, aggravated kidnaping, and deviate sexual assault arising out of an incident occurring on July 17, 1983. This court upheld his death sentence in that case in 1986. (*People v. Johnson* (1986), 114 Ill.2d 170, 102 Ill.Dec. 342, 499 N.E.2d 1355.) Defendant was represented by counsel throughout the proceedings which culminated in his death sentence, and, as demonstrated by the foregoing, had ample opportunity to become acquainted with his right to counsel. *Cf. People v. Hall* (1986), 114 Ill.2d 376, 412-13, 102 Ill.Dec. 322, 499 N.E.2d 1335 (it is "reasonable to conclude" that defendant was aware of the requirement that the jury reach a unanimous decision on the death sentence since he "had the experience" of four prior felony convictions); *People v. Albanese* (1984), 104 Ill.2d 504, 536, 85 Ill.Dec. 441, 473 N.E.2d 1246 (since defendant had already been sentenced to death by a jury in a related case, he was "familiar with the jury's function at the sentencing hearing").

Finally, it is clear that defendant suffered no prejudice as a result of the trial court's failure to specify the minimum penalty to which he would be subjected in the event of his conviction. Defendant was fully apprised that he could receive the death penalty, and that was, in fact, the punishment imposed. We note in this connection that he does not assert his decision to waive counsel would have been different had he been specifically admonished regarding the possibility of a sentence to life imprisonment and our review of the record, including his alleged reasons for choosing to represent himself, indicates that he could make no such claim. *Cf. People v. Hall* (1986), 114 Ill.2d 376, 412, 102 Ill.Dec. 322, 499 N.E.2d 1335 ("It is apparent that the requirement that a jury reach a unanimous decision on the death sentence played no part in [defendant's] jury waiver, and we will not find error in the court's failure to admonish [him] of the requirement").

It is our view, based on the record, that the trial court did what it could to accommodate defendant during the entire course of the proceedings. Defendant, on the other hand, engaged in conduct designed to impede and delay these proceedings. As previously noted, at defendant's request, the trial court allowed his privately retained counsel to withdraw from the case, and appointed Mr. Andreano of the public defender's office to represent him. At the time of the appointment, defendant stated that he would be "more than satisfied" if Mr. Andreano served as his counsel. Then, several months later, on the eve of trial, defendant advised the court that he wished to have new counsel appointed from "outside" Will County and not affiliated with the public defender's office. When the request was denied because defendant failed to provide any basis for the appointment of new counsel, defendant stated that he would not "accept" his current counsel; he would not represent himself, and he intended to absent himself from the proceedings.

The next day, having apparently changed his mind, defendant appeared in court. However, he refused to represent to the trial court whether or not he intended to proceed *pro se*. On several occasions, defendant attempted to delay and manipulate the proceedings by refusing the services of his counsel and refusing to represent himself.

We recognize, of course, the importance of a defendant's right to counsel. However, we cannot countenance use of that right in a manner which appears calculated to "thwart the administration of justice or to otherwise embarrass the effective prosecution of crime." (*People v. Myles* (1981), 86 Ill.2d 260, 268, 55 Ill.Dec. 939, 427 N.E.2d 59.) As this court recently stated in *People v. Taylor* (1984), 101 Ill.2d 508, 523, 79 Ill.Dec. 151, 463 N.E.2d 705, wherein defendant claimed he was denied the effective assistance of counsel:

> "Defendant repeatedly interfered with counsel's efforts to represent him competently, and attempted to delay the proceedings on several occasions by asserting his inability to obtain counsel and his desire to waive counsel and appear *pro se*. * * * Our system of criminal justice simply could not function were we to permit defendants, indigent or otherwise,

> to intentionally hamper counsel's efforts to represent them and later plead the resulting ineffectiveness of counsel as a grounds for reversal."

See also *People v. Hall* (1986), 114 Ill.2d 376, 403-04, 102 Ill.Dec. 322, 499 N.E.2d 1335; *People v. Friedman* (1980), 79 Ill.2d 341, 349, 38 Ill.Dec. 141, 403 N.E.2d 229.

Similarly, a defendant should not be permitted to frustrate the trial court's efforts to conduct an orderly, fair and expedient trial, and then benefit from an alleged error by the court which he invited through his own conduct.

In addition to the foregoing, we believe the admonishments defendant received in this case were sufficient since, although he represented himself, he had the benefit of standby counsel "for advice and consultation at all times during the course of [the] trial." Whether or not defendant actually chose to avail himself of their services, and the extent to which counsel in fact participated in the proceedings is not, as defendant suggests, the relevant inquiry.

In *People v. Myles* (1981), 86 Ill.2d 260, 55 Ill.Dec. 939, 427 N.E.2d 59, the defendant similarly had his privately retained counsel removed from the case, refused to proceed *pro se*, and stated that he did not desire the services of the public defender whom the court had appointed. The trial court refused to allow the assistant public defenders to withdraw, and they were available to advise defendant throughout the trial. Although they apparently tendered advice to defendant, they did not participate in the trial. In determining that Rule 401(a) was inapplicable under these circumstances, this court held:

> "Here defendant clearly and repeatedly declined to undertake his own representation. * * * Defendant's refusal to heed the advice or employ the services of appointed counsel did not necessitate that the circuit court admonish defendant in accordance with Rule 401(a)." 86 Ill.2d at 269, 55 Ill.Dec. 939, 427 N.E.2d 59.

Defendant invites us to reconsider our holding in *Myles* in light of the United States Supreme Court's subsequent decision in *McKaskle v. Wiggins* (1984), 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122. We decline to do so as *McKaskle* is not apposite to the issue before us.

In *McKaskle*, the Court held that defendant's sixth amendment right to self representation was not violated by the trial court's appointment of standby counsel over defendant's objection. In so holding, the Court stated that a defendant who wishes to proceed *pro se* must "preserve actual control over the case," and "participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that defendant is representing himself." In proceedings outside the jury's presence, defendant must be able to "address the court freely on his own behalf" and any disputes between him and his counsel should be resolved in his favor. 465 U.S. at 178-79, 104 S.Ct. at 951, 79 L.Ed.2d at 133-34.

Defendant is apparently arguing that, based upon *McKaskle*, he in fact proceeded *pro se* despite the appointment of standby counsel, and thus compliance with Rule 401(a) was necessary. However, *McKaskle* did not address the issues of when a defendant will be deemed to waive counsel and what specific admonishments are necessary in the event he does. That case was concerned only with the extent to which standby counsel may participate in the proceedings consistent with defendant's right to represent himself.

In a related contention, defendant asserts that his alleged waiver of counsel violated the sixth amendment because he was misled by the trial court's statement that he could be incarcerated for a "number of years" when, in fact, the minimum penalty was life imprisonment. As previously noted, this comment was made in the context of the trial court's explanation to defendant as to the role of a jury in the death sentencing hearing. The court informed defendant that it was the jury's province to recommend the death penalty and, if it chose not to do so, it was the court's responsibility to determine the length of defendant's prison sentence. This remark was an accurate explanation of the roles of the judge and jury during

the sentencing phase of the proceeding. Thus, defendant's argument is reduced again to the contention that he was not advised that life imprisonment was the minimum applicable penalty in the event he was convicted. For the same reasons that the failure to so admonish defendant did not violate Rule 401(a), under the facts of this case, we do not believe defendant's sixth amendment rights were violated.

Defendant cites several Federal court cases for the proposition that his alleged waiver of counsel was not "knowing" or "voluntary" because he was not accurately advised of the range of possible punishments. (*Von Moltke v. Gillies* (1948), 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309; *Molignaro v. Smith* (5th Cir.1969), 408 F.2d 795; *Meadows v. Maxwell* (6th Cir.1967), 371 F.2d 664; *Gannon v. United States* (6th Cir.1953), 208 F.2d 772.) In each of these cases, contrary to the instant case, the defendants both waived their right to counsel *and*, without benefit of counsel, pled guilty to the charges against them. Moreover, the admonishments the defendants received in those cases fall far short of those which defendant here received.

We do not mean to imply by our holding that trial courts may disregard the admonishments set forth in Rule 401(a). It would have been preferable, in the instant case, if the court recited to defendant each of those admonishments. We hold only that, considering all of the circumstances of this case, defendant was sufficiently admonished in accordance with Rule 401(a). *Cf. People v. Stewart* (1984), 101 Ill.2d 470, 485-87, 79 Ill.Dec. 123, 463 N.E.2d 677 (the trial court substantially complied with Rule 402, relating to guilty pleas, although it did not specifically advise defendant of the nature of the charge against him or the minimum penalty applicable in the event he was convicted).

Defendant further contends that his convictions should be reversed because the prosecutor made two comments during closing argument in the guilt phase of the trial which allegedly denied him his right to a fair trial. Neither of the comments as to which defendant assigns error was objected to at trial. Thus, as the State points out, defendant would ordinarily be precluded from raising these issues on appeal. *People v. Hall* (1986), 114 Ill.2d 376, 418, 102 Ill.Dec. 322, 499 N.E.2d 1335; *People v. Lewis* (1981), 88 Ill.2d 129, 149, 58 Ill.Dec. 895, 430 N.E.2d 1346 (objections to prosecutor's argument not raised are waived).

However, defendant did raise, in his *pro se* post-trial motion, that "prejudicial, inflammatory" remarks were made by the prosecutor during his closing argument. Moreover, during the April 10, 1986, hearing on defendant's motion, he specifically referred to the two remarks which he now asserts were improper. Accordingly, we have considered the comments which defendant contends constitute prejudicial error.

[2] Defendant initially argues that the prosecutor's characterization of him as an "animal" was an improper attempt to inflame and prejudice the jury. Specifically, the prosecutor made the following remark during closing argument:

> "Mr. White: What you have heard in this case was how five people became involved in Greenware by Merry [*sic*], the ceramic shop on East Cass Street on August 20, 1983.
>
> Four of those people were butchered by an animal, and that animal is among us today, and he sits right there. (Indicating.)"

This court has consistently "emphasized that prosecutors may not engage in inflammatory" arguments designed solely to arouse the passions of the jury. (*People v. Bryant* (1983), 94 Ill.2d 514, 523, 69 Ill.Dec. 84, 447 N.E.2d 391, citing *People v. Whitlow* (1982), 89 Ill.2d 322, 60 Ill.Dec. 587, 433 N.E.2d 629.) Indeed, this court has specifically held that it is improper to characterize a defendant as an "animal," even where that characterization is based on the evidence. (*People v. Mackey* (1964), 30 Ill.2d 190, 195 N.E.2d 636; *People v. Elder* (1962), 25 Ill.2d 612, 186 N.E.2d 27. Accord, *Darden v. Wainwright* (1986), 477 U.S. 187, 106 S.Ct. 2464, 91 L.Ed.2d 144.) Nevertheless, "[i]mproper remarks gener-

ally do not constitute reversible error unless they result in substantial prejudice to the accused." *People v. Tiller* (1982), 94 Ill.2d 303, 321, 68 Ill.Dec. 916, 447 N.E.2d 174, quoting *People v. Baptist* (1979), 76 Ill.2d 19, 29, 27 Ill.Dec. 782, 389 N.E.2d 1200. See also *People v. Johnson* (1986), 114 Ill.2d 170, 199, 102 Ill.Dec. 342, 499 N.E.2d 1355 (improper prosecutorial comments which are not a material factor in defendant's conviction do not constitute reversible error).

Here, the jury was specifically instructed that closing arguments are not evidence, and to disregard any statements made during arguments which were not based on evidence. Prior to commencing his closing argument, the prosecutor also informed the jury that "what I say here in argument is not evidence." We note additionally that the comment, to which defendant did not object, was an isolated remark and was not dwelled upon further by the prosecutor.

Moreover, the evidence presented at trial was not "closely balanced" (*People v. Carlson* (1980), 79 Ill.2d 564, 576-77, 38 Ill.Dec. 809, 404 N.E.2d 233.) Indeed, defendant does not even contend that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

The record reveals that three of the victims, Pamela Ryan, Anna Ryan, and Barbara Dunbar, drove to the ceramic shop on the morning of the murders in a 1977 Chevrolet Blazer belonging to Pamela Ryan and her husband. The Blazer was discovered later that afternoon at a nearby car wash. The testimony from various police officers and investigators established that two of defendant's fingerprints were found on the vehicle, one of which was recovered from an apparent bloodstain on the gear shift.

Photographs were taken of footprint impressions discovered at the scene of the murders and in the area where the Blazer was parked at the car wash. The footprints were made by a gym shoe with a diamond-shaped pattern, and could have been made by a size 10 or 11 shoe. The diamond pattern was identical to the one depicted on the soles of a pair of size 10 or 11 Converse All-Star gym shoes recovered from the home of Dully and Sam Myers, with whom defendant was residing. Defendant wore size 11 shoes.

In addition, three .357 magnum caliber shells with a Lubaloy coating were recovered from the home in which defendant resided. Bullet fragments discovered at the scene of the murders also had a Lubaloy coating, which one witness testified was an "unusual" ammunition coating. While the fragments were unsuitable for further comparison, they could have been fragments from a .357-caliber bullet.

Three of the victims' purses, which contained virtually no money, were discovered in a creek located about three-tenths of a mile from Jim's Pool Hall in Joliet. Testimony revealed that defendant was gambling at that pool hall on the afternoon of the murders, at which time he had approximately $500 in cash. Other evidence revealed that the victims had $500 to $600 in cash in their purses on the morning of the murders.

Finally, defendant is a black man and two Negroid hair fragments were recovered from a blood-stained cloth found near one of the victim's bodies. Although one witness, apparently a black woman, testified that she visited the ceramic shop a few days before the murders, she stated that she did not use that cloth.

We are cognizant that some conflicting testimony was presented at trial, and that the evidence against defendant was circumstantial. We also recognize that he produced two witnesses who claimed to have seen an individual other than defendant operating the Ryans' vehicle on the afternoon of the murders. Nevertheless, after a careful review of the record, we are convinced that the improper comment did not constitute a material factor in defendant's convictions or deprive defendant from receiving a fair trial. We therefore conclude that the remark did not constitute reversible error.

Defendant further claims that, during his closing argument, the prosecutor improperly asserted his personal opinion, and argued facts which were not based on evidence, in an alleged effort to discredit a principal defense witness. In order to address defendant's contention, it is necessary to briefly review the relevant testimony adduced at trial.

Sandra Killman testified for the defense that during the afternoon of August 20, 1983, while driving in the vicinity of East Cass Street, she observed a red and white Blazer with license plate number RR640, which other evidence indicated was the license number of the Ryans' vehicle. She stated that the vehicle was operated by a Caucasian male with "sandy-blond hair, about shoulder-length, and in his early twenties."

On cross-examination, Killman stated that she underwent hypnosis several weeks subsequent to the murders. Prior to being hypnotized, she was unable to describe the driver of the Blazer.

During the State's rebuttal, David Simpson, a sergeant with the Will County sheriff's office, testified that he interviewed Killman in connection with her observation of the Blazer. Killman personally pointed out to him the locations where she observed the vehicle. According to the measurements Simpson obtained, Killman was approximately 580 feet from the Blazer at the time she first observed it. She was 850 feet from the vehicle when she first observed the license plate. Simpson also testified that the letters on a license plate are approximately three inches in height.

With reference to Killman's observation of the Blazer, the prosecutor made the following remark during closing argument:

"Mr. White: She first saw the Blazer at 580 feet, as it was measured, and then saw a license plate from a distance of 850 feet.

Now, the letters or numbers on a license plate are two inches, three inches high. From 850 feet, if you take the standard print, approximately one eighth of an inch in a magazine print. Since there are 24 one eighths to three inches, one is to 24 as what is to 850 feet, and if you work that proportion out, it would be similar to reading a magazine from a distance of 35.4 feet, and you can hold a magazine at 35.4 feet, and it is literally impossible to read, absolutely impossible to read that magazine.

You can't read it from 600 feet. A license plate, which would be the same as 25 feet, if you take it even to 300 feet, that's reading a magazine from 12-and-a-half feet, and that, too, is impossible."

[3] We agree with defendant that it is improper for a prosecutor to express his personal opinion or to argue facts which are not based on any evidence. (*People v. Weaver* (1982), 92 Ill.2d 545, 65 Ill.Dec. 944, 442 N.E.2d 255; *People v. Brier* (1963), 29 Ill.2d 511, 194 N.E.2d 280.) However, it is perfectly permissible for the prosecutor to state an opinion which is based on the record, or on a legitimate inference derived therefrom. *E.g., People v. Johnson* (1986), 114 Ill.2d 170, 102 Ill.Dec. 342, 499 N.E.2d 1355; *People v. Owens* (1984), 102 Ill.2d 88, 79 Ill.Dec. 663, 464 N.E.2d 261; *People v. Bryant* (1983), 94 Ill.2d 514, 69 Ill.Dec. 84, 447 N.E.2d 304.

[4] Contrary to defendant's contention, the prosecutor's opinion that the license plate would have been "impossible" to read was based on testimony relating to the distance from which Killman claimed to have observed the plate, and the height of the letters appearing on the license plate. The prosecutor's comparison between reading a license plate and a magazine, even if the jury could comprehend it, did not, as defendant suggests, "so [infect] the trial with unfairness as to make the resulting conviction[s] a denial of due process." *Darden v. Wainwright* (1986), 477 U.S. 187, ——, 106 S.Ct. 2464, 2472, 91 L.Ed.2d 144, 157.

Having determined that no reversible error occurred during the guilt phase of defendant's trial, we next consider allegations of error at the sentencing proceeding.

[5] Defendant initially contends that he did not knowingly and intentionally waive his right to counsel during the sentencing hearing and the hearing on his post-trial motion. We note that defendant failed to raise this issue in the trial court. (See *People v. Precup* (1978), 73 Ill.2d 7, 16, 21 Ill.Dec. 863, 382 N.E.2d 227.) Further, we

believe that defendant's sixth amendment rights were not violated by the trial court's failure to repeat at the subsequent proceedings the same admonishments it gave him prior to trial.

At the commencement of the sentencing proceeding, defendant informed the court that he waived his right to a jury, "and any defense in this sentencing phase, and I will be absenting myself from the sentencing phase of the trial." The trial court then advised defendant that he could return to the courtroom when he desired, and that he was entitled to cross-examine any of the witnesses and to consult with standby counsel, who would be present for the proceedings. Defendant was subsequently placed in a room where he could listen to the proceedings through an audio system. The record does not reveal whether counsel actually assisted defendant; however, he did cross-examine a witness at length and objected to the admission of certain evidence.

Since we have previously held that the admonishments defendant received prior to trial were sufficient, the precise issue here is whether his alleged waiver of counsel at that time was operative during all subsequent proceedings. Under the circumstances of this case, and based upon this court's decision in *People v. Baker* (1982), 92 Ill.2d 85, 65 Ill.Dec. 1, 440 N.E.2d 856, we hold that it was.

In *Baker*, the defendant appeared for his arraignment on a murder charge with court-appointed counsel, and informed the trial court that he did not wish to be represented by an attorney. The court advised him, as it did on other occasions, that he had a right to counsel at all stages of the proceedings. Defendant persisted in his refusal to be represented by counsel, and entered a plea of guilty to the charge. Approximately two weeks later, defendant appeared at his sentencing hearing without counsel, and received a term of 30 years to life imprisonment.

The appellate court concluded that defendant was entitled to a new sentencing hearing because the court failed to again advise him at the sentencing hearing of his right to counsel. This court reversed, concluding that the trial judge was not "required to renew the offer of counsel or ascertain whether defendant had changed his mind when he appeared for sentencing two weeks later." (92 Ill.2d at 91, 65 Ill.Dec. 1, 440 N.E.2d 856.) In so holding, this court noted:

> "The greater number of courts considering the precise issue here presented have held that a competent waiver of counsel by a defendant once made before the court *carries forward to all subsequent proceedings* unless defendant later requests counsel or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings." (Emphasis added.) 92 Ill.2d at 91-92, 65 Ill.Dec. 1, 440 N.E.2d 856.

Here, of course, defendant did not change his mind and later request counsel and, contrary to his claim, there is nothing in the record which suggests that he only intended to represent himself during the guilt phase of the trial. Moreover, we do not agree with defendant's claim that *Baker* is distinguishable because there, unlike in the instant case, the trial court specifically stated that he was entitled to an attorney "at all stages of the proceeding."

The trial court specifically advised defendant that he had a right to be represented by an attorney, and did so in the context of apprising him that he was charged with capital offenses for which the State could seek the death penalty. In addition, as previously noted, defendant had already been convicted of murder and sentenced to death in another case, and was represented by counsel throughout those proceedings. Thus, he became familiar with his right to counsel during post-trial proceedings. Further, the fact that defendant had standby counsel present during those proceedings belies any claim that he was unaware of his right to counsel.

Defendant further asserts that the "continuing waiver" doctrine adopted in *Baker* and the several cases cited therein should be rejected as contrary to the holding in *Chessman v. Teets* (1957), 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253. We disagree, as that case is factually inapposite.

In *Chessman*, the defendant chose to represent himself during the trial proceedings, although the court advised him of his right to counsel. Subsequent to the proceedings, the official court reporter for the case died, and the testimony was transcribed by other reporters. A hearing was conducted on settlement of the transcript, which constituted the record upon which the State supreme court could decide defendant's appeal. Counsel for the State was present; however, despite his request, defendant was not permitted to participate in the hearing. An attorney was not appointed to attend the hearing on his behalf. The United States Supreme Court held that where defendant's request to appear *pro se* in the settlement proceeding was denied, it was incumbent on the court to appoint him counsel for the proceeding despite defendant's waiver of counsel at trial. The failure to do so rendered the *ex parte* hearing a denial of due process.

Similarly, the remaining cases upon which defendant primarily relies for the proposition that the "continuing waiver" rule is invalid are distinguishable from the instant case. In *Rini v. Katzenbach* (7th Cir.1968), 403 F.2d 697, the trial court failed to advise defendant of his right to counsel at *any* stage of the proceedings, including the sentencing hearing where defendant attempted to withdraw a previously entered guilty plea. In both *Davis v. Holman* (5th Cir.1965), 354 F.2d 773, and *Tobin v. United States* (7th Cir.1968), 402 F.2d 307, defendants, without benefit of counsel, changed their pleas from not guilty to guilty. Finally, in *Williams v. Alabama* (5th Cir.1965), 341 F.2d 777, the court merely held that an effective waiver of counsel at trial could not operate retroactively to cure the trial court's failure to offer the defendant counsel at his arraignment. The court further noted that defendant was prejudiced by not having counsel at the arraignment to plead a potentially meritorious insanity defense.

Here, of course, we are not confronted with the situation wherein a defendant who previously waived counsel later chooses to enter a guilty plea without benefit of an attorney's advice. Since the facts in this case do not reveal any change in circumstances which might trigger the necessity to admonish defendant anew, his alleged waiver of counsel prior to trial was operative throughout the subsequent proceedings.

Defendant next asserts that because there is some "residual doubt" of his guilt, imposition of a death sentence is "inappropriate and excessive." Again, defendant failed to raise this issue in the trial court. In any event, even assuming that "residual" or "whimsical" doubt were a factor warranting a lesser penalty, there is simply no evidence in the record that the trial court harbored any such doubt with respect to defendant.

[6] The court presided over defendant's trial and was the sentencing authority during the death penalty hearing. Based on the evidence before him, and after considering all aggravating and mitigating circumstances, the court determined that the death penalty was appropriate. Given defendant's prior serious criminal history, and the multiple offenses involved in this case, we do not agree that imposition of the death penalty upon defendant was excessive.

Defendant further contends that he was denied the opportunity to confront witnesses against him during the second phase of the sentencing hearing when the trial court allowed into evidence the hearsay testimony of John Meduga, an investigator with the Illinois Department of State Police, and Lee Chandler, a witness to one of defendant's previous offenses.

Chandler testified, *inter alia*, that he and his companion Penny Williams were accosted in her automobile on the evening of February 15, 1970, by an individual "later identified" as the defendant. He stated that defendant took his wallet, struck Williams repeatedly, burned her with a cigarette lighter, and sexually assaulted her.

Officer Meduga testified that he interviewed Gayle Payne in connection with a July 1983 incident in which she was kid-

napped, raped and stabbed and her companion, Anthony Hackett, was shot to death. Meduga stated that Payne identified defendant as the perpetrator of the offenses. He also stated that bullets recovered from the scene of the offense and from Hackett's body were identified by an employee of the State crime lab as .357-magnum Lubaloy bullets.

We note initially that defendant failed to object to this testimony, and did not raise the admission of this evidence as error in his post-trial motion. Thus, the alleged errors would normally be deemed waived. See *People v. Szabo* (1986), 113 Ill.2d 83, 93, 100 Ill.Dec. 726, 497 N.E.2d 995; *People v. Precup* (1978), 73 Ill.2d 7, 16, 21 Ill.Dec. 863, 382 N.E.2d 227.

[7] Further, "it is well settled that a defendant in a capital case has no due process right to cross-examine all out-of-court sources of information relied upon in sentencing." (*People v. Jones* (1982), 94 Ill.2d 275, 286, 68 Ill.Dec. 903, 447 N.E.2d 161, citing *Williams v. New York* (1949), 337 U.S. 241, 250-51, 69 S.Ct. 1079, 1085, 93 L.Ed. 1337, 1343-44. But see *Proffitt v. Wainwright* (11th Cir.1982), 685 F.2d 1227, 1253-54 (defendant was entitled to cross-examine a physician witness before his report could be used in determining sentence).) Thus, hearsay testimony is not "*per se*" inadmissible during the second phase of a sentencing proceeding (*People v. Hall* (1986), 114 Ill.2d 376, 417, 102 Ill.Dec. 322, 499 N.E.2d 1335; *People v. Morgan* (1986), 112 Ill.2d 111, 143, 97 Ill.Dec. 430, 492 N.E.2d 1303), even where there has been no showing that the declarant is unavailable to testify. See *People v. Szabo* (1986), 113 Ill.2d 83, 94-95, 100 Ill.Dec. 726, 497 N.E.2d 995; *People v. Del Vecchio* (1985), 105 Ill.2d 414, 437-38, 86 Ill.Dec. 461, 475 N.E.2d 840.

[8] The "factors controlling the admissibility of evidence at a capital sentencing hearing are relevance and reliability." (*People v. Hall* (1986), 114 Ill.2d 376, 416, 102 Ill.Dec. 322, 499 N.E.2d 1335; *People v. Eddmonds* (1984), 101 Ill.2d 44, 65, 77 Ill.Dec. 724, 461 N.E.2d 347.) Defendant does not, nor could he, contend that the evidence was irrelevant or unreliable. The testimony by both witnesses related to prior violent criminal offenses for which defendant was convicted.

Finally, we note that even if the evidence was erroneously introduced, the sentencing hearing was conducted by a trial judge acting without a jury, and he "is presumed to consider only competent and relevant evidence in determining sentence." *People v. Johnson* (1986), 114 Ill.2d 170, 205, 102 Ill.Dec. 342, 499 N.E.2d 1355, quoting *People v. Morgan* (1986), 112 Ill.2d 111, 144, 97 Ill.Dec. 430, 492 N.E.2d 1303.

Defendant next asserts that the trial court's alleged belief that it could not consider sympathy or prejudice in imposing sentence violated the eighth and fourteenth amendments of the United States Constitution. Defendant apparently refers to Instruction I.01(C) of the Illinois Pattern Jury Instructions, Criminal, No. 1.01(a) (2d ed. 1981), which requires the trier of fact to base its verdict on the evidence and not on any sympathies or prejudices which may exist.

Once again, defendant did not raise this issue in the trial court. Moreover, this court has previously rejected his claim (*People v. Morgan* (1986), 112 Ill.2d 111, 145-46, 97 Ill.Dec. 430, 492 N.E.2d 1303), and the United States Supreme Court has now upheld as constitutional an instruction to the jury in a capital sentencing hearing not to consider, *inter alia*, "sympathy" or "prejudice." *California v. Brown* (1987), 479 U.S. ——, ——, 107 S.Ct. 837, 838, 93 L.Ed.2d 934, 938.

Nevertheless, defendant urges that we reconsider our prior holding in light of *Caldwell v. Mississippi* (1985), 472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240, wherein the Supreme Court noted that "compassionate factors" are permissible considerations in capital cases. This court, too, "has acknowledged that mercy is a relevant factor for consideration at a capital sentencing hearing, but it is to be considered within the context of all factors in aggravation and mitigation." (*People v. Hall* (1986), 114 Ill.2d 376, 416, 102 Ill.Dec. 322, 499 N.E.2d 1335, citing *People v. Holman* (1984), 103 Ill.2d 133, 170, 82 Ill.Dec. 585, 469 N.E.2d 119.) In the instant case, the record reveals that the trial court did consider mercy for the defendant, but determined that there were no factors which warranted it, or which justified imposition of a sentence other than the death penalty.

Finally, defendant raises numerous contentions concerning the constitutionality of the death penalty statute which were not raised in his post-trial motion and which have already been resolved. This court has determined that the statutory grant of discretion and authority to the prosecutor is proper (*People v. Davis* (1983), 95 Ill.2d 1, 69 Ill.Dec. 136, 447 N.E.2d 353; *People v. Brownell* (1980), 79 Ill.2d 508, 38 Ill.Dec. 757, 404 N.E.2d 181); that the statute provides for adequate review to insure that sentences are not arbitrarily imposed (*People v. Kubat* (1983), 94 Ill.2d 437, 69 Ill.Dec. 30, 447 N.E.2d 247); that the sentencing authority need not make written factual findings (*People v. Del Vecchio* (1985), 105 Ill.2d 414, 86 Ill.Dec. 461, 475 N.E.2d 840); that defendants need not receive pretrial notice of all the aggravating factors upon which the State intends to rely (*People v. Albanese* (1984), 104 Ill.2d 504, 85 Ill.Dec. 441, 473 N.E.2d 1246); that the State is not required to prove the absence of mitigating factors beyond a reasonable doubt (*People v. Perez* (1985), 108 Ill.2d 70, 90 Ill.Dec. 932, 483 N.E.2d 250); that the sentencing authority is not required to make a specific finding that death is the appropriate sentence (*People v. Del Vecchio* (1985), 105 Ill.2d 414, 86 Ill.Dec. 461, 475 N.E.2d 840; *People v. Walker* (1985), 109 Ill.2d 484, 94 Ill.Dec. 530, 488 N.E.2d 529); and that the statutory provision limiting application of the death sentence to defendants who do not require assistance to be fit for trial is not arbitrary (*People v. Whitehead* (1987), 116 Ill.2d 425, 108 Ill.Dec. 376, 508 N.E.2d 687).

Defendant has provided no basis upon which this court should reconsider those holdings, but has instead referred us to the opinion of a Supreme Court justice who dissented from the denial of *certiorari* in two cases. We thus decline the invitation to overrule our previous decisions.

For the reasons stated herein, the judgment of the circuit court of Will County is affirmed. The clerk of this court is directed to enter an order setting Tuesday, March 22, 1988, as the date on which the sentence entered in the circuit court of Will County is to be carried out. The defendant shall be executed by lethal injection in the manner provided by section 119-5 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat.1983, ch. 38, par. 119-5). A certified copy of the mandate of this court shall be transmitted by the clerk of this court to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution wherein defendant is confined.

Judgment affirmed.

Justice SIMON, concurring in part and dissenting in part:

I concur in the portion of the majority opinion affirming the defendant's convictions. I dissent, however, from the imposition of the death sentence for the reasons stated in my separate opinion in *People v. Lewis* (1981), 88 Ill.2d 129, 179, 58 Ill.Dec. 895, 430 N.E.2d 1346 (Simon, J., dissenting), based on my belief that the Illinois death penalty statute is unconstitutional and that the death sentence in this case should be vacated. See also *United States ex rel. Lewis v. Lane* (C.D.Ill.1987), 656 F.Supp. 181, 195 (expressing "grave doubts" over the constitutionality of the Illinois death penalty statute); *Eddmonds v. Illinois* (1984), 469 U.S. 894, 896, 105 S.Ct. 271, 272, 83 L.Ed.2d 207, 208 (Marshall, J., dissenting) (urging review of the Illinois death penalty statute because "there are serious questions about the constitutionality of a scheme that gives the prosecutor the unbridled discretion to select, from the group of individuals convicted of an offense punishable by death, the subgroup that will be considered for death"); *DeGarmo v. Texas* (1985), 474 U.S. 973, 975, 106 S.Ct. 341, 338, 88 L.Ed.2d 322, 323 (Brennan, J., dissenting) (quoting *Gregg v. Georgia* (1976), 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859, 883) ("[t]he selection process for the imposition

of the death penalty does not begin at trial; it begins in the prosecutor's office. His decision whether or not to seek capital punishment is no less important than the jury's. Just like the jury, then, where death is the consequence, the prosecutor's 'discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action' "); see Schnapper, *The Capital Punishment Conundrum*, 84 Mich.L.Rev. 715, 719 (1986) (quoting White, Book Review, *Life in the Balance: Procedural Safeguards in Capital Cases* (1984)) ("Any system that permits prosecutors to refrain from seeking the death penalty * * * 'will exhibit all of the vices that *Furman* found antithetical to the values of the Eighth Amendment' "); Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J.Crim.L. & Criminology 1067 (1983) (arguing that prosecutors seek the death penalty for extralegal considerations); Note, *State v. Wilson: The Improper Use of Prosecutorial Discretion in Capital Punishment Cases*, 63 N.C.L.Rev. 1136, 1144 (1985) (concluding that "unbridled prosecutorial discretion permits arbitrary and capricious imposition of the death penalty").

I also disagree with the majority's apparent conclusion that because the sentencing hearing was conducted before a judge and not a jury (119 Ill.2d at 119, —— Ill.Dec. at ——, 518 N.E.2d at 114) the erroneous admission of evidence would be harmless error. Although there is a presumption that a judge considers only competent and relevant evidence in determining a sentence, it is a presumption only. My view is that if the evidence erroneously admitted is so prejudicial or voluminous as to draw into question any person's ability—judge or jury—to completely discount the evidence, the presumption may be set aside. It defies common sense and human nature to simply presume that a judge would not be affected by the introduction of such evidence.

For these reasons, I respectfully dissent.

119 Ill.2d 111

Dennis M. KELLERMAN, Adm'r, Petitioner,

v.

Brian L. CROWE, Judge, et al., Respondents.

Teresa JANUS, Indiv. and as Adm'r, Petitioner,

v.

Brian L. CROWE, Judge, et al., Respondents.

Nos. 63804, 63807.

Supreme Court of Illinois.

Dec. 21, 1987.

In products liability actions, the Circuit Court, Cook County, Brian L. Crowe, J., granted retailer defendants' motions for dismissal, and entered findings purporting to make dismissals immediately appealable. Plaintiffs were granted leave to file complaints for mandamus. The Supreme Court, Miller, J., held that orders granting retailer defendants' motions for dismissal after product manufacturer was identified and sued were not final appealable orders, where statute allowed plaintiffs to reinstate previously dismissed defendants if it appeared that action against product manufacturer was unavailable or would be fruitless.

Writs denied, supervisory orders entered.

1. Appeal and Error ⇐79(2)

Orders granting nonmanufacturer defendants' motions for dismissal in product liability actions upon identification of product manufacturer were not final appealable orders; statute allowed plaintiff to have reinstated to pending product liability action previously dismissed defendant once it appeared that action against product manufacturer was unavailable or would be fruitless. S.H.A. ch. 110, ¶2-621; ch. 110A, ¶304(a).

2. Mandamus ⇐4(1)

Mandamus is not substitute for appeal.

Corboy & Demetrio, P.C., Chicago, for petitioners.

Leonard M. Ring and Associates, Chicago, for petitioner, Teresa Janus, individually and as Special Administratrix of the Estate of Adam Janus, Deceased, and Tadeus Janus, Individually and as Special Administrator of the Estate of Stanley Janus, Deceased.

Richard M. Daley, State's Atty. of Cook County, Chicago, for respondent Brian L. Crowe, Joan S. Cherry, Deputy State's Atty. Chief, Civil Actions Bureau, Philip H. Mitchell, Asst. State's Atty., of counsel.

Clausen Miller Gorman Caffrey & Witous, P.C., Chicago, for respondent, Jewel Companies, Inc.

Justice MILLER delivered the opinion of the court:

These consolidated actions, complaints for writs of *mandamus*, raise a common question concerning the finality of dismissal orders entered under section 2-621 of the Code of Civil Procedure (Ill.Rev.Stat. 1985, ch. 110, par. 2-621). That statute is applicable to product liability actions and permits a nonmanufacturer defendant, such as a retailer or other link in the distribution chain, to be dismissed from the proceedings once the product manufacturer has been identified and sued. The statute also provides that in certain circumstances a dismissal order may be vacated and a previously dismissed defendant reinstated. In the proceedings at issue here, the trial judge granted the motions of two retailer defendants for dismissal under section 2-621 and entered findings under Supreme Court Rule 304(a) (107 Ill.2d R. 304(a)) purporting to make the dismissals immediately appealable. We granted the plaintiffs leave to file their complaints for *mandamus* (107 Ill.2d R. 381), and they argue here that the trial judge had no authority

to make the orders appealable under Rule 304(a).

According to the complaints for *mandamus*, the plaintiffs' decedents died in 1982 as a result of ingesting cyanide-laced capsules of a product known as Extra-Strength Tylenol. The plaintiffs—Dennis M. Kellerman, John F. Eliason, Teresa Janus, and Tadeus Janus—then brought separate actions in the circuit court of Cook County against the product manufacturer, McNeilab, Inc., a division of Johnson & Johnson Company, and against the owners of the retail stores where the product had been purchased, Jewel Companies, Inc., and F.W. Woolworth Company. Jewel and Woolworth were originally dismissed under section 2-621, but in January 1986 the causes were transferred to a different circuit judge, the Honorable Brian M. Crowe, who initially granted the parties' motions for reconsideration on a number of issues. On May 2, 1986, Judge Crowe granted motions by Jewel and Woolworth for dismissal under section 2-621. At a later proceeding the two retailers asked that the dismissal orders be made immediately appealable under Supreme Court Rule 304(a), and Judge Crowe entered findings to that effect on June 12, 1986, in the Janus actions and on July 2 and 3, 1986, in the Kellerman and Eliason actions. The instant controversy arises from the Rule 304(a) findings.

Section 2-621 provides a method by which a nonmanufacturer may be dismissed from a product liability action at an early stage in the proceedings and therefore avoid incurring the costs that arise from defending such actions. The statute provides that a nonmanufacturer "shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage." (Ill.Rev.Stat.1985, ch. 110, par. 2-621(a).) Once the product manufacturer has been sued and has answered or otherwise pleaded, the trial court is to dismiss the certifying defendants. (Ill.Rev.Stat.1985, ch. 110, par. 2-621(b).) A defendant is not to be dismissed from the action, however, if it shares some responsibility for the creation of the defect in the product or had actual

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. ROBERT KUBAT, Petitioner,	)	
v.	)	No. 87 C 8423 Honorable Nicholas J. Bua, Presiding
JAMES THIERET, et al., Respondents.	)	

MEMORANDUM ORDER

This case presents this court with a rare opportunity to confront some unique and significant legal issues. Pursuant to 28 U.S.C. §2254(d), petitioner in this case seeks a writ of habeas corpus vacating his convictions and death sentence. His habeas petition marks only the third time since the enactment of the revised Illinois death penalty statute in 1977 that an Illinois defendant has asked a federal district court to overturn a death sentence. 1/ After reviewing the superbly articulated arguments presented in petitioner's superlative brief, this court denies the petition with respect to petitioner's conviction, but grants the petition with respect to petitioner's sentence.

I. BACKGROUND

On June 18, 1980, a jury in Lake County, Illinois found Robert Kubat guilty of the aggravated kidnapping and murder of Lydia Hyde. Following Kubat's

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1/ The other two cases of this type were decided just last year. See Gaines v. Thieret, 665 F.Supp. 1342 (N.D. Ill. 1987); United States ex rel. Lewis v. Lane, 656 F.Supp. 181 (C.D. Ill.), aff'd, 832 F.2d 1446 (7th Cir. 1987).

jury had also received an appropriate instruction:

> A conviction ought not to rest on an equivocal direction to the jury on a basic issue . . . . The Government's suggestion [that the erroneous instruction was harmless error] really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law . . . .

Bollenbach v. United States, 326 U.S. 607, 613-14 (1946). Although Frankfurter wrote these words in the course of reversing a conviction, his admonition applies with even greater force to a death sentence. When a capital jury receives contradictory instructions about sentencing, there is simply no way of knowing whether the jury has relied on the correct instruction or the erroneous instruction during its sentencing deliberations. In effect, the conflicting instructions allow the jury to usurp the judge's function by selecting which law shall apply. With a defendant's life at stake, a reviewing court cannot simply presume that a capital jury, when confronted with conflicting instructions, selected and applied the correct law in arriving at its sentence. A jury's imposition of the ultimate penalty under these circumstances is completely unacceptable; the jury's assumption of a judicial role undermines the painstaking procedural safeguards built into the capital sentencing process. Consequently, the judge's erroneous instruction to the jury provides another basis for vacating Kubat's death sentence.

4. Constitutionality of the Illinois Death Penalty Statute

Finally, Kubat's petition challenges the constitutionality of the Illinois death penalty statute. Because this court has already decided to vacate Kubat's death sentence on narrower grounds, it would be inappropriate for the

court to address the larger issue of the statute's constitutionality. 10/ See Parker v. County of Los Angeles, 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

The parties, however, should not construe this court's abstention as an affirmation of the statute's constitutionality. Kubat's arguments raise some troublesome questions about the Illinois Death Penalty Act. For instance, the Act empowers prosecutors with wide-ranging post-conviction discretion to decide whether or not to seek the death penalty. Because the statute imposes few if any constraints on this exercise of prosecutorial discretion, it is unclear whether Illinois law adequately guards against the sort of arbitrary and capricious application of capital punishment that the Supreme Court condemned in Furman v. Georgia, 408 U.S. 238 (1972). See Lewis, 656 F.Supp. at 195.

In addition, the Illinois statute may offend the constitutional prohibition against nondiscretionary capital sentencing. The Supreme Court has repeatedly emphasized the need for an individualized sentencing determination in each particular capital case. See, e.g., Skipper v. South Carolina, 106 S.Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). In keeping with this principle, the Court has consistently struck down

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10/ Under similar circumstances, Judges Plunkett and Baker also declined to rule on the constitutionality of the Illinois statute. See Gaines, 665 F.Supp. at 1371-72; Lewis, 656 F.Supp. at 195.

statutory provisions for a mandatory death penalty, ruling that such provisions violate the Eighth and Fourteenth Amendments. See Sumner v. Shuman, 107 S.Ct. 2716 (1987); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The Illinois statute seems to clash with these precedents by mandating the imposition of a death sentence in the absence of mitigating evidence. See Owens, supra. In a case where no mitigating evidence is presented, the statute deprives a capital jury of the discretion to preclude the death penalty — even if the jury believes that the State's aggravating evidence does not justify a death sentence. This feature of the Illinois Death Penalty Act could leave the statute vulnerable to constitutional attack.

In the instant case, however, any constitutional challenge to the Illinois statute is moot; this court has already granted Kubat relief from his sentence. Thus, although Kubat has raised serious questions about the constitutionality of the Illinois death penalty statute, resolution of those questions must await another day.

III. CONCLUSION

Having rejected Kubat's arguments concerning the sufficiency of evidence introduced at trial, the reliability of identification testimony stemming from photographic identification procedures, and the legal assistance he received at trial, this court finds no reason to vacate Kubat's convictions. On the other hand, Kubat has advanced two compelling reasons for this court to overturn his death sentence. First, Kubat received ineffective assistance of counsel at his sentencing hearing. Second, the judge erroneously instructed the jury that a sentence other than death would require the jury's unanimous approval.

For the foregoing reasons, this court grants Kubat's petition with respect to his death sentence, but denies the petition in all other respects. This court hereby vacates Kubat's sentence of death. The State shall have 120 days from the issuance of this order to resentence Kubat.

On this court's own motion, execution of this order is stayed pending appeal by the parties.

IT IS SO ORDERED.

Nicholas J. Bua
Judge, United States District Court

Dated: February 25, 1988

** TOTAL PAGE.004 **